

15 April 1977

MEMORANDUM FOR :

FROM :



Office of General Counsel

STATINT

SUBJECT :

Directives from the House Appropriations
Committee Regarding Intelligence Community
Reprogramming and Management Activities

OGC Has Reviewed

1. Questions have arisen regarding the limits of authority of the House Appropriations Committee to direct certain action on the part of the Intelligence Community Staff. Such direction has extended to the prohibition of proposed reprogramming actions, the termination of ongoing programs and the establishment of requirements regarding IC Staff internal management structure.

2. At the outset, the foregoing would suggest that the doctrine of separation of powers needs be considered. Each of the departments of government must perform the duties assigned to it, and it is an established and fundamental principle of constitutional law that one department cannot interfere with, or encroach on, either of the other departments.¹ The rule is generally recognized that constitutional restraints are overstepped where one department of government attempts to exercise powers exclusively delegated to another and that officers of any branch of the government may not usurp or exercise the powers of either of the others.² In the exercise of the powers of government assigned to them severally, the departments operate independently of each other, and the action of any one of them in the exercise of its own powers is not subject to control by either of the others.³ Legislative power, as distinguished from executive power, is the authority to make laws, but not to implement them or appoint the agents charged with their implementation.⁴

3. Unfortunately, while the separation of powers doctrine is fundamental and well established, it does not lend itself to being a clear

¹16 C.J.S. Constitutional Law §104.

²16 AmJur 2d Constitutional Law §210.

³id, §213.

⁴Springer v. Philippine Islands, 277 U.S. 189, 72 LEd 845, 485 Ct. 480 (1928).

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rule of decision in many cases. The delineation of executive versus legislative functions is more the product of accepted practice than definition by law.

4. However, with regard to the question as to whether the House Appropriations Committee may prescribe the internal workings of the IC Staff, the conclusion that it may not seems clear from the separation of powers doctrine alone. While the Congress may establish agencies or departments or commissions, and statutory positions within them, the management of such agencies is clearly an executive function.

5. In regard to reprogramming actions, some rather definite guidelines have been established and agreed to between the Congress, which appropriates the funds, and the executive, which expends them. Of significance here are the reprogramming guidelines to be found in DoD Instruction 7510.10 because of specific reference thereto made in the joint letter from the Chairmen of the Appropriations Committees to the Director of OMB concerning the intelligence community budget for fiscal year 1976. Reprogramming actions which require prior notification to the Congress under this instruction are those involving an increase of [] or more in a budget activity in the military personnel appropriations or the operation and maintenance appropriations, an increase of [] or more in a procurement line item or the addition of a procurement line item of [] or more, an increase of [] or more in any program in an RDT&E appropriation, and the addition of a new RDT&E program element, the cost of which is estimated to be [] or more within a three-year period. Also requiring prior notification are actions below the threshold amounts which will result in significant follow-on costs. In addition, the classified letter referred to indicates that the Committees expect to be informed of any changes in favor of projects which potentially could be embarrassing to the United States.

6. It is important to note that the categories of reprogramming actions outlined in the previous paragraph are those for which notification of the Congress is required. These are found in section VI of the Instruction. Those reprogramming actions for which Congressional approval is required are outlined in section V of the Instruction. These reprogramming actions are those involving items or activities for which specific reductions in the amounts originally requested were made by the Congress, increases in the procurement quantity of an aircraft, missile, naval vessel, tracked combat vehicle and related equipment, and an action the nature of which has been designated a matter of special congressional interest.

7. Political considerations may weigh against relying on the distinction between a notification requirement and an approval requirement in dealing with the Congress. Nonetheless, where Congress has itself indicated the appropriate guideline to be followed by officials in the executive agencies,